84-725

No. _____

In The
Supreme Court of the United States
October Term, 1984

SNAPPER POWER EQUIPMENT,
a division of Fuqua Industries, Inc.,

Petitioner,

vs.

PATRICIA J. WOOD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The petitioner, McDonough Power Equipment Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 7, 1983 on the following issues:

1. Both the District Court and the Court of Appeals ignored dispositive decisions of the Kansas Supreme Court, contrary to 28 U.S.C. Section 1652. Petitioner's substantive right to a trial in accordance with the substantive law of the State of Kansas was denied, requiring a new trial.

2. The Court of Appeals appears to apply a double standard in assessing the severity of alleged trial errors against Petitioner and others similarly situated. Only invocation of the Supreme Court's power of supervision can alter this practice.

3. The rule applied by the Court of Appeals in the present case is contrary to the rule stated in other decisions of the Tenth Circuit Court of Appeals and other courts of appeal. The Supreme Court should therefore accept certiorari to resolve this dispute.

PARTIES

Since the trial of this case, Petitioner's corporate identity has changed. Petitioner is now the Snapper Power Equipment Division of Fuqua Industries, Inc., a Delaware corporation.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals is reproduced in the appendix at App. 1. The order of the Court of Appeals denying Petitioner's petition for rehearing is reproduced in the appendix at App. 8.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on November 7, 1983. A timely petition for rehearing was filed on November 21, 1983. The petition for rehearing was denied on July 17, 1984. This petition has been filed within ninety (90) days subsequent to the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) (1976).

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I. STATEMENT OF THE CASE

This case is a personal injury action involving injuries suffered by the plaintiff, Patricia Wood, when a riding lawnmower operated by plaintiff fell from a retaining wall onto a flight of stairs. Plaintiff suffered injuries to her foot and leg from contact with the lawnmower blade. Plaintiff claimed that her injuries were caused by defects in the lawnmower, and filed suit in the U.S. District Court for the District of Kansas, where the accident occurred. Jurisdiction in the District Court was based on diversity of citizenship pursuant to 28 U.S.C. Section 1332.

Suit was filed not only against the defendant lawnmower manufacturer but also against the individual owners of the lawnmower operated by the plaintiff. Plaintiff sought to recover against the individual owners on a theory of common law negligence for failing to inform plaintiff of the alleged defects in the lawnmower when providing it for her use. Up to the time of trial common law negligence claims were made against all parties, with an

alternative claim based upon common law strict liability against the defendant manufacturer.

The case was tried to a jury between April 12 and April 16, 1982, in the United States District Court for the District of Kansas sitting in Kansas City, Kansas. There was conflicting evidence presented at trial concerning the facts surrounding plaintiff's accident. According to plaintiff's testimony, she was engaged in mowing the lawn at an apartment structure owned by the individual defendants on the day of the accident. A portion of the lawn to be mowed was adjacent to a concrete stairway, and was divided from the stairway by a retaining wall. Plaintiff testified that she stopped the mower a short distance away from the retaining wall, and was propelled over the edge of the retaining wall when she released the clutch to start the mower moving forward again. She alleged that the front end of the mower raised off the ground (a phenomenon described by expert witnesses as "lift-off") which resulted in the loss of steering ability. At some point during the fall, plaintiff's left foot came into contact with the rotating lawnmower blade, resulting in her injuries.

Two other witnesses testified that Mrs. Wood did not stop, but instead drove over the side of the retaining wall while her attention was distracted to her rear. These witnesses testified that Mrs. Wood was looking back over her left shoulder at the time of the accident, and simply drove off the edge of the retaining wall through inadvertance.

In spite of this substantial evidence of contributory negligence on the part of the plaintiff, the trial court refused all suggestions by the defendant for jury instructions and evidentiary rulings premised on plaintiff's con-

tributory negligence. The court advised counsel for all parties that these rulings would be made if counsel for plaintiff would amend his contentions and proceed solely on a theory of strict liability against the defendant manufacturer. Plaintiff's counsel took the court's advice and announced his decision to proceed against the defendant manufacturer on a strict liability theory only. This announcement was made only after the close of plaintiff's evidence.

The defendant manufacturer was not allowed to introduce evidence to rebut the inference of negligent conduct created by plaintiff's case in chief due to these rulings. The defendant manufacturer was prohibited from showing the nature and quality of its conduct in designing and selling the lawnmower because the court felt that these issues do not belong in a strict liability case. At the same time the jury was allowed to hear evidence relating to the reasonableness of the individual defendants' conduct. This double standard was re-emphasized in the court's instructions to the jury. The jury was instructed to consider the plaintiff's possible failure to exercise ordinary care only in respect to the claims against the individual defendants. The jury was expressly instructed to ignore all of plaintiff's conduct except her actual awareness of the alleged defects in the lawnmower in determining the liability of the defendant manufacturer. These instructions effectively directed the jury to ignore the testimony contradicting plaintiff's version of the accident in assessing fault, unless the jury found the individual defendants negligent.

The District Court Judge had only three months earlier received answers from the Kansas Supreme Court to

a certified question propounded under the Uniform Certification of Questions of Law Act, K.S.A. 60-3201, et seq. The District Court Judge had on his desk the opinion in *Forsythe v. Coats Company, Inc.*, 230 Kan. 553, 639 P.2d 43 (1982), informing him that the Kansas Comparative Negligence Act applies in strict liability actions contrary to the assumptions underlying the instructions given to the jury in this case. The law as stated in the opinion of the Kansas Supreme Court was not applied, however.

Plaintiff's ordinary negligence was undoubtedly in issue since the pretrial order listed her acts of negligence as claimed by the defendant manufacturer. Counsel also strenuously objected to the court's refusal to allow the consideration of lack of ordinary care. At no time did plaintiff's counsel suggest on the record that a contributory negligence instruction would be improper. The District Court denied the defendant's request of its own volition without any comment from plaintiff's counsel.

The erroneous refusal to instruct on contributory negligence was compounded by numerous other errors in the instructions including an improper definition of product defect and an erroneous standard for finding that the product was unreasonably dangerous, which is required by Kansas law.

The jury returned a special verdict finding no liability on the part of the individual defendants and liability based on the theory of strict products liability against the defendant manufacturer. The jury apportioned 49% fault to plaintiff and 51% fault to defendant McDonough Power Equipment Company, Inc. The individual defendants were not found negligent. Plaintiff's total damages were as-

sessed at $105,000.00. Judgment was entered on June 1, 1982 in favor of plaintiff for 51% of the total damages ($53,550.00), in accordance with the Kansas Comparative Negligence Statute, K.S.A. 60-258a.

Under the Kansas statute a finding of 50% fault or more on the part of the plaintiff would have required a judgment for the defense. The jury finding of 49% fault on plaintiff's part presumably represents a finding that plaintiff was aware of whichever alleged defect was found to be present, in accordance with the Court's instructions. The jury also presumably ignored plaintiff's lack of ordinary care in failing to keep a proper lookout, as required by the instructions..

Both Plaintiff and Defendant McDonough moved for a new trial alleging error in the Court's instructions on the fault of the parties. Defendant's motion also alleged numerous other grounds The motions for a new trial were denied in the same order entering judgment in favor of plaintiff.

The defendant manufacturer appealed. Plaintiff did not cross appeal the denial of her motion for new trial. The individual defendants were not parties to the appeal. Oral arguments were presented to the Tenth Circuit Court of Appeals in Denver, Colorado on August 1, 1983. A written opinion was issued by the three judge panel on November 7, 1983.

The opinion of the Tenth Circuit Court of Appeals upheld the decision of the District Court despite the uncontrovertable errors in evidentiary rulings and jury instructions. The decisions of the Kansas Supreme Court, the U.S. District Court for the District of Kansas, and of the Tenth Circuit Court of Appeals confirming the appli-

cability of ordinary contributory negligence principles in strict liability cases were simply ignored. The exclusion of otherwise admissible evidence intended to rebut the implication of wrongful conduct on the part of the manufacturer were apparently excused as harmless error. The Court of Appeals opinion implies that exclusion of such testimony was proper because some evidence was presented on the subject. The opinion of the Court of Appeals was not designated for publication.

On the very same day that this unpublished opinion was issued the Tenth Circuit Court of Appeals issued the published opinion in *Prince v. Leesona Corporation,* 720 F.2d 1166 (10th Cir. 1983). The *Prince* case also involved questions concerning comparative fault in product liability actions tried under Kansas law. The decision reached in the *Prince* case was diametrically opposed to the result in the present case and in accord with Kansas decisions. On petition for rehearing this obvious inconsistency was pointed out to the court. The Court of Appeals was also informed that the Kansas Court of Appeals had expressed approval of the interpretation followed in the *Prince* case. The Court of Appeals was invited to resolve any ambiguity in the law by certifying one or more questions to the Kansas Supreme Court.

The petition for rehearing was taken under advisement for a period in excess of eight months. Despite this opportunity for review and research to confirm the inconsistency of the two opinions issued on the same day and the virtual certainty that the result in the present case was erroneous, the petition for rehearing was denied.

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II. REASONS FOR GRANTING THE PETITION

1. Both the District Court and the Court of Appeals ignored dispositive decisions of the Kansas Supreme Court, contrary to 28 U.S.C. Section 1652. Petitioner's substantive right to a trial in accordance with the substantive law of the State of Kansas was denied, requiring a new trial.

2. The Court of Appeals appears to apply a double standard in assessing the severity of alleged trial errors against Petitioner and others similarly situated. Only invocation of the Supreme Court's power of supervision can alter this practice.

3. The rule applied by the Court of Appeals in the present case is contrary to the rule stated in other decisions of the Tenth Circuit Court of Appeals and other courts of appeal. The Supreme Court should therefore accept certiorari to resolve this dispute.

This is a renewal of a complaint previously voiced by this Petitioner in *McDonough Power Equipment, Inc. v. Greenwood,* — U.S. —, 78 L.Ed.2d 663, 104 S.Ct. — (1984). The Tenth Circuit Court of Appeals has neglected the substantive rights of Petitioner and others similarly situated. In the present case repeated erroneous decisions assisted the plaintiff in obtaining a favorable verdict. Further erroneous interpretations of state law were required to uphold the verdict on appeal. Even though the trial errors were obvious and significant, the judgment in favor of the sympathetic party was not disturbed.

Certiorari should be granted due to the seriousness of the violation of Petitioner's right to a trial under the

same principles of law which would apply in state court. The decisions of the District Court and the Court of Appeals create a distinct body of federal common law in diversity cases, contrary to the Rules of Decision Act.

In a diversity case federal courts are required to follow state law on substantive issues pursuant to the Rules of Decision Act, 28 U.S.C. Section 1652. An ordinary common law product liability action involving an injury to a Kansas resident arising from a Kansas accident is therefore to be governed by the law of the State of Kansas. The District Court in this case refused to follow the clearly announced law of the State of Kansas in its conduct of the trial. The Court of Appeals sanctioned this conduct in an opinion that it refused to designate for publication. The result reached was diametrically opposed to the published opinions of the Tenth Circuit Court of Appeals on the same subject. The Court of Appeals was made aware that the unpublished opinion is contrary both to its own published opinions and to state law, yet refused to rehear the matter after being expressly informed of the conflict between this decision and all other published decisions.

On January 15, 1982, nearly three months before trial commenced at the District Court level, the Kansas Supreme Court issued its opinion in *Forsythe v. Coates Company, Inc., supra.* The *Forsythe* opinion was an answer to a question certified by Judge Earl E. O'Connor, Chief Judge of the U.S. District Court for the District of Kansas, and the judge presiding over the trial in the present case. The question to be answered involved the applicability of the Kansas Comparative Negligence Act, K.S.A. 60-258a, to actions based upon common law strict liability. The Kansas Supreme Court informed Judge

O'Connor that the Comparative Negligence Act was to be applied to strict liability actions in its entirety, without modification or alteration. The opinion of the Kansas Supreme Court held that common law strict liability under Kansas law was to be treated as the equivalent of common law negligence, for purposes of applying the Comparative Negligence Act. Ordinary driver negligence could be compared causatively with strict liability.

The Trial Court had more than two months in which to read this opinion and was presumably aware when trial commenced in this case on April 12, 1982 that Kansas law prohibited special treatment of questions of fault in strict liability cases. Despite this knowledge the trial Judge instructed counsel for the parties that he was prepared to give special dispensation to plaintiff and to limit the defenses available to the petitioner if only the claim of common law negligence against petitioner were dropped. The claim was dropped, and rulings depriving petitioner of defenses based on comparative fault followed.

Other Kansas District Court Judges clearly perceived the status of the law of Kansas at the same time. For example, in *Miller v. Johns-Manville Sales Corp.*, 538 F. Supp. 631 (D.C. Kan. 1982) decided on April 14, 1982 during the midst of the trial in the present case, District Judge Theis had the following comments:

> In Kansas, despite continued reference of Section 402A [of the Restatement 2d Torts], and invocation of the doctrine of strict liability, strict product liability is dead. *Whether you compare negligence or fault, the distinction is in reality abolished.* Under strict liability certain conduct of persons using, or exposed to, a product, could behave in foreseeable yet 'negligent' ways, and not have their recovery reduced.

> The theory was that manufacturers and suppliers were supposed to protect those people from their own ignorance and their own folly, because the manufacturers and suppliers had superior knowledge and were better able to act to protect the people who would come in contact with the products; and because it was determined as a matter of social policy the costs were more appropriately allocated to society at large and to the manufacturers and suppliers, rather than to the lone unfortunate individual who had been injured. *Comparative fault, as applied in Kansas, no longer allocates the risks in that manner.* See, e.g., *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 541 P.2d 353 (1982). (Emphasis supplied).

The only reason stated for the trial court's refusal to follow the opinions of the Kansas Supreme Court was the then newly published decision in *Rexrode v. American Laundry Press Co.*, 674 F.2d 826 (10th Cir. 1982), cert. denied 459 U.S. 862, 74 L.Ed.2d 117, 103 S.Ct. 137 (1982). That decision of the Tenth Circuit Court of Appeals opined incorrectly that Kansas would continue to distinguish between common law strict liability and common law negligence. The District Court therefore chose to accept the opinion of the Tenth Circuit Court of Appeals in preference to the explicit stated answer of the Kansas Supreme Court to a certified question. There can be no more blatant violation of the Rules of Decision Act.

Later in 1982 even the Tenth Circuit Court of Appeals recognized that Kansas law makes no distinction between common law negligence and strict liability insofar as comparative fault issues are concerned. In *Hardin v. Manitowoc-Forsythe Corporation*, 691 F.2d 449 (10th Cir. 1982), the Tenth Circuit Court of Appeals held in an opinion written by Justice McKay that contributory fault of all

kinds on the part of all participants to an accident must be considered in a Kansas product liability case. The *Hardin* decision was cited in Petitioner's brief in the present case. Despite the existence of the *Hardin* case, the *Miller* decision, the *Forsythe* case, and numerous other decisions by both state and federal courts reaching the same conclusion, the Tenth Circuit Court of Appeals in this case ignored the stated law of Kansas by refusing to recognize the errors of the trial court. The Court of Appeals instead chose to rely upon the outdated *Rexrode* decision, despite having repudiated *Rexrode* in the *Hardin* case.

On the very same day as this court held that no error was committed by refusing to instruct on contributory negligence, the Tenth Circuit Court of Appeals published its decision in *Prince v. Leesona Corporation, supra.* The *Prince* decision affirmed the earlier holding in *Hardin* to the effect that lack of ordinary care was a submissible defense in a Kansas product liability action.

Petitioner has repeatedly called these incomprehensible conflicts to the attention of the Tenth Circuit Court of Appeals, without any explanatory response. Instead Petitioner's motions are rejected without opinions. This is not the first time that this Petitioner has voiced this objection to an opinion of the Tenth Circuit Court of Appeals. Only last year Petitioner successfully petitioned for review of the Tenth Circuit decision in another lawnmower case, reported as *McDonough Power Equipment, Inc. v. Greenwood, supra.* The *McDonough* case also involved a situation where lack of ordinary care on the part of a lawnmower operator and others was allowed as a defense in a strict product liability action under Kansas law. Nor is this the first time that other product liability defend-

ants have felt aggrieved by similar rulings. In *Rexrode v. American Laundry Press Company, supra,* an unsuccessful petition for certiorari was filed. The rationale for the *Rexrode* opinion was later implicitly admitted to be erroneous in the *Hardin* case, *supra,* but of course this did not retrieve the $750,000.00 plus interest paid by the defendant in that case.

Justice is not done when the District Court and the Circuit Court of Appeals admit their error a year or two after erroneously affirming a judgment for tens or hundreds of thousands of dollars against a defendant who should have been granted a new trial. Although civil actions are customarily treated as of less significance than criminal prosecutions, it should be kept in mind that the amounts in controversy far exceed any fines imposed in the typical criminal prosecution. While it is regrettable that occasionally vast sums of money change hands due to unwise decisions or erroneous interpretations, such serious results never should occur because the law has been shaped expressly to favor one class of litigants over another.

The unwillingness of the Tenth Circuit Court of Appeals to afford equal justice to those who can "afford to pay" is best illustrated by comparing the opinion in the present case to the very recent product liability decision of *Robinson v. Audi NSU Auto Union,* 739 F.2d 1481 (1984). The case was previously reviewed by the U.S. Supreme Court as *World Wide Volkswagen v. Woodson,* 444 U.S. 286, 62 L.Ed.2d 490, 100 S.Ct. 559 (1981). In that case a plaintiff was permitted a new trial against the defendant automobile importer, even though a verdict in favor of the defendant automobile manufacturer was up-

held. A new trial was ordered because evidence technically admissible against the defendant importer but inadmissible against the defendant manufacturer had been excluded by the trial court. The *Robinson* opinion makes no analysis whatever concerning harmless error or the substantiality of the trial court's error. The plaintiff's right to a new trial was deemed to be automatic, once it was shown that some admissible evidence had been excluded. Unlike *Robinson* in the present case the Tenth Circuit Court of Appeals has held that the exclusion of whole volumes of testimony tending to rebut an inference of wrongful conduct is harmless because some testimony which might tangentially have addressed that point was admitted. Either no standard is being followed, or two separate and irreconcilable standards are being applied.

The actual mental processes of the various members of the Tenth Circuit Court of Appeals are of course outside the knowledge of Petitioner. Neither the presence or absence of subjective goodwill, nor the individual motives of justices should be the determinant in any case. But where the pattern of treatment of certain litigants is otherwise inexplicable and apparently irrational, subjective prejudice can be inferred. The 1981 opinion in *Rexrode, supra,* could have been viewed as an isolated instance of error. But the subsequent unreasonable treatment of this Petitioner in *Greenwood,* followed by the repudiation of the *Rexrode* decision in *Hardin,* when viewed in light of subsequent decisions consistently applying a different standard of review where the rights of product liability defendants are involved demonstrates a disturbing pattern of unequal consideration for the rights of litigants. The unwillingness of the Circuit Court of Appeals to refer

any claimed ambiguity to the Kansas Supreme Court by certification as suggested by Petitioner suggest a subjective unwillingness to follow the Rules of Decision Act as one possible explanation.

Review of this case is also mandated by the objective failure of the Tenth Circuit Court of Appeals to follow any one rule of law in determining whether trial errors are of sufficient significance to warrant a new trial. The Tenth Circuit Court of Appeals apparently still follows a standard of presumptive error and prejudice in cases where certain plaintiffs seek a new trial, and presumptive harmlessness where certain defendants complain, contrary to the rule of *McDonough Power Equipment v. Greenwood, supra.* Despite *Greenwood,* the Tenth Circuit Court of Appeals granted a new trial for a plaintiff who could show no abuse of discretion and no substantial prejudice in *Robinson v. Audi NSU, supra.* Some plaintiffs are still allowed new trials on demand, while many of the most grievous errors committed against defendants are ignored as in the present case.

The showing of error made by Petitioner in this case has been held to be more than sufficient to require a new trial by other circuit courts. For example, instructions erroneously distinguishing between contributory negligence and assumption of the risk required a new trial in *Casper v. Barber & Ross Company,* 288 F.2d 379 (D.C. Cir. 1961). It has also been held that jury instructions which failed to set out the contentions made by the parties deprived the jury of any rational ability to apply abstract principles of law to the facts, in *Swietlowich v. County of Bucks,* 610 F.2d 1157 (3rd Cir. 1979). The general rule followed by most courts is stated in *Bass v. International*

Brotherhood of Boiler Makers, 630 F.2d 1058 (5th Cir. 1980):

> Only if the trial judge's instructions to the jury, taken as a whole, give a misleading impression or inadequate understanding of the law and issues to be resolved, is a new trial required.
> 630 F.2d at 1062.

There can be no question that this standard has been met in the present case. The Court's jury instructions taken as a whole required the jury to differentiate between the defendants in determining the validity of affirmative defenses. The jury was expressly instructed that the plaintiff's ordinary contributory negligence was to be considered only as it related to the liability of the individual defendants, and was to be ignored in comparing fault against the Petitioner. Had the jury been instructed to consider plaintiff's conduct in the same light without regard to the identity of the defendant found liable, a different apportionment of fault would probably have resulted. A change of a single percentage point in the apportionment of negligence would have made the difference between a verdict for plaintiff and a verdict for defendant.

The evidentiary rulings were of equal significance. Plaintiff's half of the trial was conducted under principles of negligence, and evidence of Petitioner's alleged negligence was admitted. But when plaintiff rested the Court's suggestion that the law of the case be changed was accepted by the plaintiff and the remainder of the trial proceeded on a strict liability theory. Defendant was therefore prohibited from introducing any evidence of the nature and quality of its own conduct to rebut the inference of culpability presented by plaintiff's evidence. The

jury was therefore required to compare defendant's conduct as described in plaintiff's evidence against plaintiff's conduct as described in plaintiff's evidence. The jury was never allowed to hear petitioner's description of its own conduct or any evidence on that subject, and was instructed to ignore all evidence of Petitioner's version of plaintiff's conduct. Petitioner was literally deprived of any ability to defend itself against plaintiff's case. The decision to change the rules of law to be applied to the case during the middle of the trial resulted in two separate and distinct trials wherein Petitioner's evidence simply could not relate to or respond to plaintiff's evidence. The jury of course had no alternative but to consider Petioner's lack of rebuttal evidence significant, resulting in a high proportion of fault assessed against Petitioner.

III. CONCLUSION

What is at stake in this case is not just a few thousand dollars. What is at stake here is the consistency of the federal court system's role in hearing disputes between citizens of different states. If the only complaint that could be made was that an incorrect conclusion was reached, this petition would never be filed. What is at issue is the objective appearance of inequality in the treatment of lititgants in the Tenth Circuit Court of Appeals and its subsidiary courts. If any other remedy were available which did not require the limited time and resources of the United States Supreme Court that remedy would be sought. The Tenth Circuit Court of Appeals has refused all other remedies to Petitioner, however, including the

preferred method of a rehearing en banc or certification to the Kansas Supreme Court. Petitioner therefore respectfully requests that this Petition for Certiorari be granted so that the obligations imposed by the Rules of Decision Act can be discharged.

Respectfully submitted,

/s/ Donald Patterson
DONALD PATTERSON AND
STEVE R. FABERT
Counsel for Petitioner,
McDonough Power Equipment, Inc.

APPENDIX

NOT FOR ROUTINE PUBLICATION

(Filed November 7, 1983)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1790

PATRICIA J. WOOD and IVAN WOOD,

Plaintiffs-Appellees,

vs.

McDONOUGH POWER EQUIPMENT, INC.
a Fuqua Industry Corporation,

Defendant-Appellant.

Appeal from the United States District Court
For the District of Kansas
(D.C. No. CIV-77-2228)

Ronald R. Holliger, Kansas City, Missouri, for Plaintiffs-Appellees.

Steve R. Fabert, of Fisher, Patterson, Sayler & Smith, Topeka, Kansas, for Defendant-Appellant McDonough Power Equipment, Inc.

Before HOLLOWAY and SEYMOUR, Circuit Judges, and BOHANON, Senior District Judge*

BOHANON, District Judge

On June 5, 1976, plaintiff Patricia J. Wood sustained injuries when the Snapper riding lawn mower she was operating plunged over a retaining wall and rolled down

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*Honorable Luther Bohanon, Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

a flight of concrete steps. The Snapper mower involved in the accident was designed, manufactured, and sold by the appellant-defendant McDonough Power Equipment, Inc. (hereinafter McDonough). The mower was owned by various individuals doing business as the Barcelona West Apartments. Plaintiff-Appellee filed both a negligence cause of action against the owners of the apartments, and a cause of action sounding in strict liability against McDonough.

The strict liability action was prosecuted on multiple theories of liability. One theory was based on the fact that a design defect was present in the mower which produced a "lift off" of the front wheels under certain operating conditions which resulted in complete loss of steering ability. The plaintiff also presented the theory that a design defect existed due to the lack of a "quick stop" mechanism to protect against blade contact in the event the mower tipped or rolled over. Finally, Mrs. Wood alleged that a warning defect existed for failure to advise of the "lift off" and "quick stop" defects.

The case was tried to a jury in April, 1982. After a five-day trial, the jury returned a special verdict of no liability on the part of the apartment owner but liability against the defendant manufacturer. The jury, applying the Kansas law of comparative fault, assessed 49 percent contributory fault against the plaintiff and 51 percent of the fault against McDonough. After apportionment of the fault, the plaintiff was rendered judgment in the amount of $53,500 ($105,000 actual damages).

Defendant McDonough appeals asserting three basic errors. First, McDonough argues that the district court erred in refusing to retroactively apply the provisions of

the Kansas Product Liability Act (K.S.A. 1981 Supp. 60-3301 et seq.). Second, the appellant contends that the court erred when it refused to allow the defense of contributory negligence to the strict liability action in light of the Kansas law regarding the doctrine of comparative fault. And third, defendant McDonough claims the trial court erred by excluding evidence of compliance with industry standards.

Kansas Product Liability Act

After this case began and the pretrial order was filed, the Kansas Product Liability Act was passed by the Kansas Legislature. This Act contained provisions regarding the manufacturer's duty to warn. K.S.A. 1981 Supp. 60-3305. In pertinent part the statute reads:

> "60-3305. *Manufacturer's or sellers' duty to warn or protect against danger, when.* In any product liability claim any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product, and any duty to have properly instructed in the use of such product shall not extend: (a) To warnings, protecting against or instructing with regard to safeguards, precautions and actions which a reasonable user or consumer of the product, with the training, experience, education and any special knowledge the user or consumer did, should or was required to possess, could and should have taken for such user or consumer or others, under all the facts and circumstances;
>
> (b) to situations where the safeguards, precautions and actions would or should have been taken by a reasonable user or consumer of the product similarly situated exercising reasonable care, caution and procedure; or (c) to warnings, protecting against or instructing with regard to dangers, hazards or risks

> which are patent, open or obvious and which should have been realized by a reasonable user or consumer of the product."

McDonough filed a motion to add defenses based on this provision of the Kansas Product Liability Act. The motion was denied without written opinion. Later, the denial of the motion was alleged as grounds for a new trial, but the argument was again rejected. At that time, the trial court expressed its reasoning in denying the motion. It stated in its Memorandum of June 1, 1982:

> "First, McDonough claims that the court erred in excluding the defenses based upon the Kansas Product Liability Act, KSA 60-3301, et seq. We held that the Act was not retroactive and declined to apply it to cases arising before its effective date. We adhere to our previous ruling that the Act has no application to this case, and refer again to *Chamberlain v. Schmutz Manufacturing Co., Inc.*, 532 F.Supp. 588 (D. Kan. 1982)."

McDonough argues that two defenses were denied the defendants. First, the risk of blade contact in the event of roll-over or tip-over is a hazard which is patent, open or obvious and requires no warning. Second, subsection (b) would give a certain additional defense to the alleged duty to warn of the apartment owners.

Upon examination of the record, this court finds appellant's arguments to be groundless—all form and no substance. There simply is no error flowing from the denial of the retroactive application of the Kansas Product Liability Act. The "new" defense alleged to have been available to the apartment owners simply is not at issue due to their favorable judgment. McDonough's "new" defense of no duty to warn of obvious hazard is simply not a new defense. This provision of the Act is but a recodi-

fication of existing law and was previously pled and proven at trial. *See Mays v. Ciba-Geigy Corp.*, 233 Kan. 38, 661 P.2d 348 (1983). In fact, instruction No. 15 given by the trial court included this specific defense. The instruction stated in part:

> "No warning is necessary if the danger to which the user is exposed is known to him or is readily apparent to him."

This court cannot consider purely legal arguments having no effect on the outcome of the substantive issues. The denial of the retroactive application of the Kansas Product Liability Act cannot lead to a finding of error by the trial court under the facts presented. To consider the arguments of the appellant where the relief sought would result in the same instructions as those given would be to abuse our function. It is well recognized that federal courts do not render mere advisory opinions. *Norvell v. Sangre de Cristo Development Co., Inc.*, 519 F.2d 370 (10th Cir. 1975). There is no requirement for the court to reach the issue of retroactive application of the Kansas Product Liability Act.

Comparative Fault

The appellant argues that the trial court erred in its instruction of the jury on the law of comparative fault as applied to strict liability actions. However, the arguments lack any merit. Upon review of the instructions given by the trial court, it is clear that he specifically addressed all defenses properly raised by the appellant and incorporated the language of the most current pattern jury instructions of Kansas regarding comparative fault (Pattern Instruction of Kansas 13.23). *See Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449 (10th Cir. 1982).

At no time was any evidence as to the relative fault of the plaintiff disallowed during trial. In fact, the best indication that the jury understood the legal issues involved in the assessment of comparative fault is demonstrated in the jury finding of 49 percent causal liability of the plaintiff.

Industry Standards

During the trial of this action, McDonough sought to introduce evidence tending to show compliance with voluntary industry design standards for lawn mowers. However, on April 14 during trial and before presentation of this evidence, the opinion in *Rexrode v. American Laundry Press Company,* 674 F.2d 826 (10th Cir. 1982) was issued and directly addressed the admissibility of voluntary safety standards. The trial court, with agreement of counsel, properly found *Rexrode* dispositive of the issue and disallowed evidence of compliance with industry standards.

Subsequently however, the language contained in the original slip opinion upon which the trial court relied was modified and reissued on April 22, 1982. The appellant contends that the language as modified in the *Rexrode* opinion significantly changed the law to be applied as to the relevancy of evidence tending to show compliance with industry standards. We disagree, the change in language in the *Rexrode* case is one for clarification not substantive change in the legal position originally taken. In the original slip opinion, a statement was made that manufacturer compliance with industry standards are irrelevant in a strict liability case. However upon review, the court realized this language was too sweeping and modified the statement to read in final form:

> "[M]anufacturer compliance with industry standards is generally considered to be irrelevant in a strict liability case." 674 F.2d at 831.

The statement was tempered to reflect that the use of industry standards to prove the unavailability of technology to design a safer product would be relevant and proper. As *Rexrode* stated later in the opinion:

> "The second prong of defendant's argument for admitting the 1972 ANSI standard relates to feasibility, a factor which we would agree is extremely relevant in a design defect determination. Manufacturers are not to be held strictly liable for failure to design safety features, if the technology to do is unavailable at the time the product is made." 674 F.2d at 832

The modified language of *Rexrode* only clarified the proper use of evidence tending to show compliance with industry standards in a strict liability trial. The test of relevancy, as is always the case, is one based upon the intended use of the proffered evidence. Upon examination of the trial testimony, it is clear that the court correctly applied the rules as to admissibility of industry standards. The court limited the use of industry standards to the subject of the feasibility of remedial safety designs. Despite repeated objections *by the plaintiff,* the court allowed testimony as to the feasibility of safety features in light of the historical safety standards and practices. The court can determine no instance where prejudice to the defendant occurred due to a denial of presentation of evidence tending to show compliance with industry standards. Therefore, the argument advanced by the appellant that the trial court improperly applied the law as announced in *Rexrode* is totally without merit.

AFFIRMED.

MAY TERM—July 17, 1984

Before Honorable William J. Holloway, Jr., Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Luther L. Bahanon, District Judge

No. 82-1790

PATRICIA J. WOOD and IVAN WOOD,

Plaintiffs-Appellees,

vs.

MCDONOUGH POWER EQUIPMENT, INC., a FUQUA INDUSTRY,

Defendant-Appellant.

LOUIS POZEZ, S. LEE POZEZ, ABBOTT J. SHERR, ISAK FEDERMAN, all individually and d/b/a BARCELONA WEST APARTMENTS,

Defendants.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

/s/ Robert L. Hoecker
Chief Deputy Clerk

NOT FOR ROUTINE PUBLICATION

(Filed Nov. 7, 1983)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1790

PATRICIA J. WOOD and IVAN WOOD,

Plaintiffs-Appellees,

vs.

McDONOUGH POWER EQUIPMENT, INC.,
a Fuqua Industry Corporation,

Defendant-Appellant.

Appeal from the United States District Court
For the District of Kansas

(D.C. No. CIV-77-2228)

Ronald R. Holliger, Kansas City, Missouri, for Plaintiffs-Appellees.

Steve R. Fabert, of Fisher, Patterson, Sayler & Smith, Topeka, Kansas, for Defendant-Appellant McDonough Power Equipment, Inc.

Before HOLLOWAY and SEYMOUR, Circuit Judges, and BOHANON, Senior District Judge*

BOHANON, District Judge

On June 5, 1976, plaintiff Patricia J. Wood, sustained injuries when the Snapper riding lawn mower she was operating plunged over a retaining wall and rolled down

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*Honorable Luther Bohanon, Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

a flight of concrete steps. The Snapper mower involved in the accident was designed, manufactured, and sold by the appellant-defendant McDonough Power Equipment, Inc. (hereinafter McDonough). The mower was owned by various individuals doing business as the Barcelona West Apartments. Plaintiff-Appellee filed both a negligence cause of action against the owners of the apartments, and a cause of action sounding in strict liability against McDonough.

The strict liability action was prosecuted on multiple theories of liability. One theory was based on the fact that a design defect was present in the mower which produced a "lift off" of the front wheels under certain operating conditions which resulted in complete loss of steering ability. The plaintiff also presented the theory that a design defect existed due to the lack of a "quick stop" mechanism to protect against blade contact in the event the mower tipped or rolled over. Finally, Mrs. Wood alleged that a warning defect existed for failure to advise of the "lift off" and "quick stop" defects.

The case was tried to a jury in April, 1982. After a five-day trial, the jury returned a special verdict of no liability on the part of the apartment owner but liability against the defendant manufacturer. The jury, applying the Kansas law of comparative fault, assessed 49 percent contributory fault against the plaintiff and 51 percent of the fault against McDonough. After apportionment of the fault, the plaintiff was rendered judgment in the amount of $53,500 ($105,000 actual damages).

Defendant McDonough appeals asserting three basic errors. First, McDonough argues that the district court

erred in refusing to retroactively apply the provisions of the Kansas Product Liability Act (K.S.A. 1981 Supp. 60-3301 et seq.). Second, the appellant contends that the court erred when it refused to allow the defense of contributory negligence to the strict liability action in light of the Kansas law regarding the doctrine of comparative fault. And third, defendant McDonough claims the trial court erred by excluding evidence of compliance with industry standards.

Kansas Product Liability Act

After this case began and the pretrial order was filed, the Kansas Product Liability Act was passed by the Kansas Legislature. This Act contained provisions regarding the manufacturer's duty to warn. K.S.A. 1981 Supp. 60-3305. In pertinent part the statute reads:

> "60-3305. *Manufacturer's or sellers' duty to warn or protect against danger, when.* In any product liability claim any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product, and any duty to have properly instructed in the use of such product shall not extend: (a) To warnings, protecting against or instructing with regard to safeguards, precautions and actions which a reasonable user or consumer of the product, with the training, experience, education and any special knowledge the user or consumer did, should or was required to possess, could and should have taken for such user or consumer or others, under all the facts and circumstances;
>
> (b) to situations where the safeguards, precautions and actions would or should have been taken by a reasonable user or consumer of the product similarly situated exercising reasonable care, caution and

> procedure; or (c) to warnings, protecting against or instructing with regard to dangers, hazards or risks which are patent, open or obvious and which should have been realized by a reasonable user or consumer of the product."

McDonough filed a motion to add defenses based on this provision of the Kansas Product Liability Act. The motion was denied without written opinion. Later, the denial of the motion was alleged as grounds for a new trial, but the argument was again rejected. At that time, the trial court expressed its reasoning in denying the motion. It stated in its Memorandum of June 1, 1982:

> "First, McDonough claims that the court erred in excluding the defenses based upon the Kansas Product Liability Act, KSA 60-3301, et seq. We held that the Act was not retroactive and declined to apply it to cases arising before its effective date. We adhere to our previous ruling that the Act has no application to this case, and refer again to *Chamberlain v. Schmutz Manufacturing Co., Inc.*, 532 F.Supp. 588 (D. Kan. 1982)."

McDonough argues that two defenses were denied the defendants. First, the risk of blade contact in the event of roll-over or tip-over is a hazard which is patent, open or obvious and requires no warning. Second, subsection (b) would give a certain additional defense to the alleged duty to warn of the apartment owners.

Upon examination of the record, this court finds appellant's arguments to be groundless—all form and no substance. There simply is no error flowing from the denial of the retroactive application of the Kansas Product Liability Act. The "new" defense alleged to have been available to the apartment owners simply is not at issue due to their favorable judgment. McDonough's "new" de-

fense of no duty to warn of obvious hazard is simply not a new defense. This provision of the Act is but a recodification of existing law and was previously pled and proven at trial. *See Mays v. Ciba-Geigy Corp.,* 233 Kan. 38, 661 P.2d 348 (1983). In fact, instruction No. 15 given by the trial court included this specific defense. The instruction stated in part:

> "No warning is necessary if the danger to which the user is exposed is known to him or is readily apparent to him."

This court cannot consider purely legal arguments having no effect on the outcome of the substantive issues. The denial of the retroactive application of the Kansas Product Liability Act cannot lead to a finding of error by the trial court under the facts presented. To consider the arguments of the appellant where the relief sought would result in the same instructions as those given would be to abuse our function. It is well recognized that federal courts do not render mere advisory opinions. *Norvell v. Sangre de Cristo Development Co., Inc.,* 519 F.2d 370 (10th Cir. 1975). There is no requirement for the court to reach the issue of retroactive application of the Kansas Product Liability Act.

Comparative Fault

The appellant argues that the trial court erred in its instruction of the jury on the law of comparative fault as applied to strict liability actions. However, the arguments lack any merit. Upon review of the instructions given by the trial court, it is clear that he specifically addressed all defenses properly raised by the appellant and incorporated the language of the most current pattern

jury instructions of Kansas regarding comparative fault (Pattern Instruction of Kansas 13.23). *See Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449 (10th Cir. 1982). At no time was any evidence as to the relative fault of the plaintiff disallowed during trial. In fact, the best indication that the jury understood the legal issues involved in the assessment of comparative fault is demonstrated in the jury finding of 49 percent causal liability of the plaintiff.

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